

58:10-23.11f

LEGISLATIVE HISTORY CHECKLIST
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(Spill Compensation-
Right of Contribution)

NJSA: 58:10-23.11f

LAWS OF: 1991 CHAPTER: 372

BILL NO: S2657/A3659

SPONSOR(S) Lesniak

DATE INTRODUCED: May 17, 1990

COMMITTEE: ASSEMBLY: Energy & Environment
SENATE: Environmental Quality

AMENDED DURING PASSAGE: No-Senate Committee substitute enacted

DATE OF PASSAGE: ASSEMBLY: December 2, 1991
SENATE: May 9, 1991

DATE OF APPROVAL: January 10, 1992

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: ASSEMBLY: Yes

SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: No

MESSAGE ON SIGNING: No

FOLLOWING WERE PRINTED:

REPORTS: ~~No~~ Yes

HEARINGS: No

974.90 New Jersey
P777 Report...March 23, 1990
1990t (see especially pp. 46--49--Vol. I
(see especially pp. 23--25)--Subcommittee C

KBG/bas

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ASSEMBLY, No. 3659

STATE OF NEW JERSEY

INTRODUCED JUNE 11, 1990

By Assemblymen SPADORO and SCERNI

1 AN ACT concerning liability for the removal of certain
2 discharged hazardous substances, and amending P.L.1976, c.141.

3

4 BE IT ENACTED *by the Senate and General Assembly of the*
5 *State of New Jersey:*

6 1. Section 7 of P.L.1976, c.141 (C.58:10-23.11f) is amended to
7 read as follows:

8 7. a. Whenever any hazardous substance is discharged, the
9 department may, in its discretion, act to remove or arrange for
10 the removal of such discharge or may direct the discharger to
11 remove, or arrange for the removal of, such discharge. If the
12 discharge occurs at any hazardous or solid waste disposal facility,
13 the department may order the facility closed for the duration of
14 the removal operations. The department may monitor the
15 discharger's compliance with any such directive. Any discharger
16 who fails to comply with such a directive shall be liable to the
17 department in an amount equal to three times the cost of such
18 removal, and shall be subject to the revocation or suspension of
19 any license or permit he holds authorizing him to operate a
20 hazardous or solid waste disposal facility.

21 Whenever one or more dischargers or potentially responsible
22 parties enter into an agreement with the department to comply
23 with a directive to remove or arrange for the removal of any
24 hazardous substance that has been discharged, those dischargers
25 and potentially responsible parties shall have a right of
26 contribution against all other parties liable for the cost of the
27 removal of that discharged hazardous substance pursuant to the
28 provisions of P.L.1976, c.141, who have not entered into such an
29 agreement with the department to comply with the directive. In
30 any such action for contribution the contribution plaintiffs need
31 prove only that a discharge occurred for which the contribution
32 defendant is liable pursuant to the provisions of P.L.1976, c.141
33 and the contribution defendant shall have only the defenses to
34 liability available to parties pursuant to subsection d. of section 8
35 of P.L.1976, c.141 (C.58:10-23.11g). In resolving contribution
36 claims, a court may allocate the costs of removal among liable
37 parties using such equitable factors as the court determines are
38 appropriate. The department may, when it will expedite the
39 removal of any discharged hazardous substance, and when the
40 department determines that it is in the public good and principles

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 of fundamental fairness will not be violated, authorize settling
2 parties who seek contribution to collect treble damages from any
3 contribution defendant who has failed or refused to comply with
4 any directive and who is subject to contribution pursuant to this
5 subsection. The treble damages shall be based on the amount of
6 contribution owed by a contribution defendant. A contribution
7 defendant from whom treble damages is sought in a contribution
8 action shall not be assessed treble damages by any court where
9 the contribution defendant, for good cause shown, failed or
10 refused to enter the settlement agreement with the department
11 or with the settling parties. One third of an award of treble
12 damages in a contribution action pursuant to this subsection shall
13 be paid to the department, which sum shall be deposited in the
14 New Jersey Spill Compensation Fund. The other two thirds of the
15 treble damages award shall be shared by the contribution
16 plaintiffs in the proportion of the responsibility for the cost of
17 the removal that the settlers have agreed to with the
18 department or in an amount as has been agreed to by those
19 parties. Nothing in this subsection affects the rights of any party
20 to seek contribution pursuant to any other statute or under
21 common law.

22 Removal of hazardous substances and actions to minimize
23 damage from discharges shall, to the greatest extent possible, be
24 in accordance with the National Contingency Plan for removal of
25 oil and hazardous substances established pursuant to section
26 311(c)(2) of the federal Water Pollution Control Act Amendments
27 of 1972 (Pub.L.92-500, 33 U.S.C. § 1251 et seq.).

28 Whenever the department acts to remove a discharge or
29 contracts to secure prospective removal services, it is authorized
30 to draw upon the money available in the fund. Such money shall
31 be used to pay promptly for all cleanup costs incurred by the
32 department in removing or in minimizing damage caused by such
33 discharge.

34 The department may agree to defend and indemnify a
35 contractor against claims, causes of action, demands, costs, or
36 judgments made against a contractor arising as a direct result of
37 the contractor's provision of hazardous substance cleanup or
38 mitigation services pursuant to a contract with the department.
39 This legal defense and indemnification shall not apply to claims,
40 causes of action, demands, costs, or judgments which are proven
41 to have arisen from gross negligence, willful misconduct, fraud,
42 intentional tort, bad faith, or criminal misconduct, or to claims
43 for punitive or exemplary damage. The department shall agree to
44 provide legal defense and indemnification to a contractor only if
45 it determines that adequate environmental liability insurance is
46 not available or not available at a reasonable cost to the
47 contractor. The department shall agree to provide legal defense
48 and indemnification to a contractor pursuant to terms and
49 limitations which it deems appropriate. Any agreement by the

1 department to defend or indemnify a contractor shall not bar the
2 department from the exercise of any available legal remedies for
3 the enforcement of the contract between the department and the
4 contractor, the recovery of damages to which the department
5 may be entitled resulting from a contractor's failure to perform
6 the contract, or for the recovery of funds expended for the
7 defense of a contractor if the defense was undertaken in response
8 to a claim or cause of action brought against the contractor
9 which is proven to have arisen from gross negligence, willful
10 misconduct, fraud, intentional tort, bad faith, or criminal
11 misconduct. No person other than a contractor shall have the
12 right to enforce any agreement for defense and indemnification
13 between a contractor and the department. The department shall
14 not enter into an agreement to provide legal defense and
15 indemnification to a contractor after January 1, 1990. For the
16 purposes of this subsection, "contractor" means a person
17 providing services to mitigate or clean up a discharge or release
18 or threatened discharge or release of a hazardous substance in
19 this State pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or
20 the "Comprehensive Environmental Response, Compensation and
21 Liability Act of 1980," Pub.L. 96-510 (42 U.S.C. § 9601 et seq.).

22 Nothing in this section is intended to preclude removal and
23 cleanup operations by any person threatened by such discharges,
24 provided such persons coordinate and obtain approval for such
25 actions with ongoing State or federal operations. No action taken
26 by any person to contain or remove a discharge shall be construed
27 as an admission of liability for said discharge. No person who
28 renders assistance in containing or removing a discharge shall be
29 liable for any civil damages to third parties resulting solely from
30 acts or omissions of such person in rendering such assistance,
31 except for acts or omissions of gross negligence or willful
32 misconduct. In the course of cleanup operations, no person shall
33 discharge any detergent into the waters of this State without
34 prior authorization of the commissioner.

35 b. Notwithstanding any other provisions of P.L.1976, c.141
36 (C.58:10-23.11 et seq.), the department, subject to the approval
37 of the administrator with regard to the availability of funds
38 therefor, may remove or arrange for the removal of any
39 hazardous substance which:

40 (1) Has not been discharged from a grounded or disabled
41 vessel, if the department determines that such removal is
42 necessary to prevent an imminent discharge of such hazardous
43 substance; or

44 (2) Has not been discharged, if the department determines that
45 such substance is not satisfactorily stored or contained and said
46 substance possesses any one or more of the following
47 characteristics:

- 48 (a) Explosiveness;
49 (b) High flammability;

1 (c) Radioactivity;

2 (d) Chemical properties which in combination with any
3 discharged hazardous substance at the same storage facility
4 would create a substantial risk of imminent damage to public
5 health or safety or an imminent and severe damage to the
6 environment;

7 (e) Is stored in a container from which its discharge is
8 imminent as a result of contact with a hazardous substance which
9 has already been discharged and such additional discharge would
10 create a substantial risk of imminent damage to public health or
11 safety or imminent and severe damage to the environment; or

12 (f) High toxicity and is stored or being transported in a
13 container or motor vehicle, truck, rail car or other mechanized
14 conveyance from which its discharge is imminent as a result of
15 the significant deterioration or the precarious location of the
16 container, motor vehicle, truck, rail car or other mechanized
17 conveyance, and such discharge would create a substantial risk of
18 imminent damage to public health or safety or imminent and
19 severe damage to the environment; or

20 (3) Has been discharged prior to the effective date of
21 P.L.1976, c.141.

22 c. If and to the extent that he determines that funds are
23 available, the administrator shall approve and make payments for
24 any cleanup and removal costs incurred by the department for the
25 removal of a hazardous substance other than petroleum as
26 authorized by subsection b. of this section; provided that in
27 determining the availability of funds, the administrator shall not
28 include as available funds revenues realized or to be realized
29 from the tax on the transfer of petroleum, to the extent that
30 such revenues result from a tax levied at a rate in excess of \$0.01
31 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
32 (C.58:10-23.11h), unless the administrator determines that the
33 sum of claims paid by the fund on behalf of petroleum discharges
34 or removals plus pending reasonable claims against the fund on
35 behalf of petroleum discharges or removals is greater than 30%
36 of the sum of all claims paid by the fund plus all pending
37 reasonable claims against the fund.

38 d. The administrator may only approve and make payments for
39 any cleanup and removal costs incurred by the department for the
40 removal of a hazardous substance discharged prior to the
41 effective date of P.L.1976, c.141, pursuant to subsection b. of
42 this section, if, and to the extent that, he determines that
43 adequate funds from another source are not or will not be
44 available; and provided further, with regard to the cleanup and
45 removal costs incurred for discharges which occurred prior to the
46 effective date of P.L.1976, c.141, the administrator may not
47 during any one-year period pay more than \$18,000,000.00 in total
48 or more than \$3,000,000.00 for any discharge or related set or
49 series of discharges.

1 e. Notwithstanding any other provisions of P.L.1976, c.141, the
2 administrator, after considering, among any other relevant
3 factors, the department's priorities for spending funds pursuant
4 to P.L.1976, c.141, and within the limits of available funds, shall
5 make payments for the restoration or replacement of, or
6 connection to an alternative water supply for, any private
7 residential well destroyed, contaminated, or impaired as a result
8 of a discharge prior to the effective date of P.L.1976, c.141;
9 provided, however, total payments for said purpose shall not
10 exceed \$500,000.00 for the period between the effective date of
11 this subsection e. and January 1, 1983, and in any calendar year
12 thereafter.

13 f. Any expenditures made by the administrator pursuant to this
14 act shall constitute, in each instance, a debt of the discharger to
15 the fund. The debt shall constitute a lien on all property owned
16 by the discharger when a notice of lien, incorporating a
17 description of the property of the discharger subject to the
18 cleanup and removal and an identification of the amount of
19 cleanup, removal and related costs expended from the fund, is
20 duly filed with the clerk of the Superior Court. The clerk shall
21 promptly enter upon the civil judgment or order docket the name
22 and address of the discharger and the amount of the lien as set
23 forth in the notice of lien. Upon entry by the clerk, the lien, to
24 the amount committed by the administrator for cleanup and
25 removal, shall attach to the revenues and all real and personal
26 property of the discharger, whether or not the discharger is
27 insolvent.

28 The notice of lien filed pursuant to this subsection which
29 affects the property of a discharger subject to the cleanup and
30 removal of a discharge shall create a lien with priority over all
31 other claims or liens which are or have been filed against the
32 property, except if the property comprises six dwelling units or
33 less and is used exclusively for residential purposes, this notice of
34 lien shall not affect any valid lien, right or interest in the
35 property filed in accordance with established procedure prior to
36 the filing of this notice of lien. The notice of lien filed pursuant
37 to this subsection which affects any property of a discharger,
38 other than the property subject to the cleanup and removal, shall
39 have priority from the day of the filing of the notice of the lien
40 over all other claims and liens filed against the property, but
41 shall not affect any valid lien, right, or interest in the property
42 filed in accordance with established procedure prior to the filing
43 of a notice of lien pursuant to this subsection.

44 (cf: P.L.1987,c.415, s. 1)

45 2. This act shall take effect immediately.

46

47

STATEMENT

48

49

This bill creates a statutory right of contribution for settlers

1 under the "Spill Compensation and Control Act." Under this act,
2 a discharger of a hazardous substance or a person in any way
3 responsible for that discharge is strictly liable, jointly and
4 severally, for the cost of its cleanup. These means that a person
5 who is only partially responsible for the cost of a cleanup may be
6 required to pay the entire amount. In the normal course of tort
7 law, this person would have a right of contribution, the right to
8 collect money from others jointly responsible for the costs.
9 However, because of the ambiguity in the common law for
10 contribution for discharges of hazardous substances, and because
11 the "Spill Compensation and Control Act" fails to set forth that
12 right, many dischargers and other responsible parties have been
13 reluctant to enter into agreements with the Department of
14 Environmental Protection to cleanup a discharge of a hazardous
15 substance for fear that they would not be able to recover some of
16 their costs from the other liable parties. This has led to delays in
17 cleaning up many hazardous waste sites with the potential for
18 environmental harm.

19 This bill would rectify this problem by setting forth in the
20 "Spill Compensation and Control Act" a provision allowing those
21 parties who enter into an agreement with the department to
22 remove a hazardous discharge to seek contribution from those
23 responsible parties who have not entered into such an agreement.
24 The amount of contribution would be equal to the amount of
25 removal costs incurred by the contribution plaintiffs for which
26 the contribution defendants were liable.

27 As an additional incentive to enter into a settlement
28 agreement, and as a disincentive not to, the bill provides that a
29 party seeking contribution, in appropriate cases and with the
30 department's approval, may obtain treble damages from the
31 nonsettling parties. One third of the treble damages will be given
32 to the department for deposit in the "New Jersey Spill
33 Compensation Fund." The remainder will be divided among the
34 settling parties. Presently, treble damages may only be imposed
35 by the department upon a party who does not remove a hazardous
36 substance discharge pursuant to a departmental directive. The
37 bill protects against the unreasonable imposition of treble
38 damages for nonsettling parties by allowing treble damages only
39 with the department's approval and not allowing treble damages
40 where the nonsettling party for good cause failed or refused to
41 enter into a settlement agreement.

42 Additionally, the bill provides that in seeking contribution the
43 parties need only prove liability under the act and that the
44 parties upon whom contribution is sought could only assert those
45 defenses that they could otherwise assert against the department
46 in an original claim. Thus a nonsettling party would have no legal
47 advantage for not settling with the department.

ENVIRONMENT

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5

Provides a statutory right of contribution for dischargers and responsible parties pursuant to the "Spill Compensation and Control Act."

SENATE, No. 2657

STATE OF NEW JERSEY

INTRODUCED MAY 17, 1990

By Senator LESNIAK

1 AN ACT concerning liability for the removal of certain
2 discharged hazardous substances, and amending P.L.1976, c.141.

3
4 BE IT ENACTED *by the Senate and General Assembly of the*
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6 1. Section 7 of P.L.1976, c.141 (C.58:10-23.11f) is amended to
7 read as follows:

8 7. a. Whenever any hazardous substance is discharged, the
9 department may, in its discretion, act to remove or arrange for
10 the removal of such discharge or may direct the discharger to
11 remove, or arrange for the removal of, such discharge. If the
12 discharge occurs at any hazardous or solid waste disposal facility,
13 the department may order the facility closed for the duration of
14 the removal operations. The department may monitor the
15 discharger's compliance with any such directive. Any discharger
16 who fails to comply with such a directive shall be liable to the
17 department in an amount equal to three times the cost of such
18 removal, and shall be subject to the revocation or suspension of
19 any license or permit he holds authorizing him to operate a
20 hazardous or solid waste disposal facility.

21 Whenever one or more dischargers or potentially responsible
22 parties enter into an agreement with the department to comply
23 with a directive to remove or arrange for the removal of any
24 hazardous substance that has been discharged, those dischargers
25 and potentially responsible parties shall have a right of
26 contribution against all other parties liable for the cost of the
27 removal of that discharged hazardous substance pursuant to the
28 provisions of P.L.1976, c.141, who have not entered into such an
29 agreement with the department to comply with the directive. In
30 any such action for contribution the contribution plaintiffs need
31 prove only that a discharge occurred for which the contribution
32 defendant is liable pursuant to the provisions of P.L.1976, c.141
33 and the contribution defendant shall have only the defenses to
34 liability available to parties pursuant to subsection d. of section 8
35 of P.L.1976, c.141 (C.58:10-23.11g). In resolving contribution
36 claims, a court may allocate the costs of removal among liable
37 parties using such equitable factors as the court determines are
38 appropriate. The department may, when it will expedite the
39 removal of any discharged hazardous substance, and when the
40 department determines that it is in the public good and principles

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 of fundamental fairness will not be violated, authorize settling
2 parties who seek contribution to collect treble damages from any
3 contribution defendant who has failed or refused to comply with
4 any directive and who is subject to contribution pursuant to this
5 subsection. The treble damages shall be based on the amount of
6 contribution owed by a contribution defendant. A contribution
7 defendant from whom treble damages is sought in a contribution
8 action shall not be assessed treble damages by any court where
9 the contribution defendant, for good cause shown, failed or
10 refused to enter the settlement agreement with the department
11 or with the settling parties. One third of an award of treble
12 damages in a contribution action pursuant to this subsection shall
13 be paid to the department, which sum shall be deposited in the
14 New Jersey Spill Compensation Fund. The other two thirds of the
15 treble damages award shall be shared by the contribution
16 plaintiffs in the proportion of the responsibility for the cost of
17 the removal that the settlers have agreed to with the
18 department or in an amount as has been agreed to by those
19 parties. Nothing in this subsection affects the rights of any party
20 to seek contribution pursuant to any other statute or under
21 common law.

22 Removal of hazardous substances and actions to minimize
23 damage from discharges shall, to the greatest extent possible, be
24 in accordance with the National Contingency Plan for removal of
25 oil and hazardous substances established pursuant to section
26 311(c)(2) of the federal Water Pollution Control Act Amendments
27 of 1972 (Pub.L. 92-500, 33 U.S.C. § 1251 et seq.).

28 Whenever the department acts to remove a discharge or
29 contracts to secure prospective removal services, it is authorized
30 to draw upon the money available in the fund. Such money shall
31 be used to pay promptly for all cleanup costs incurred by the
32 department in removing or in minimizing damage caused by such
33 discharge.

34 The department may agree to defend and indemnify a
35 contractor against claims, causes of action, demands, costs, or
36 judgments made against a contractor arising as a direct result of
37 the contractor's provision of hazardous substance cleanup or
38 mitigation services pursuant to a contract with the department.
39 This legal defense and indemnification shall not apply to claims,
40 causes of action, demands, costs, or judgments which are proven
41 to have arisen from gross negligence, willful misconduct, fraud,
42 intentional tort, bad faith, or criminal misconduct, or to claims
43 for punitive or exemplary damage. The department shall agree to
44 provide legal defense and indemnification to a contractor only if
45 it determines that adequate environmental liability insurance is
46 not available or not available at a reasonable cost to the
47 contractor. The department shall agree to provide legal defense
48 and indemnification to a contractor pursuant to terms and
49 limitations which it deems appropriate. Any agreement by the

1 department to defend or indemnify a contractor shall not bar the
2 department from the exercise of any available legal remedies for
3 the enforcement of the contract between the department and the
4 contractor, the recovery of damages to which the department
5 may be entitled resulting from a contractor's failure to perform
6 the contract, or for the recovery of funds expended for the
7 defense of a contractor if the defense was undertaken in response
8 to a claim or cause of action brought against the contractor
9 which is proven to have arisen from gross negligence, willful
10 misconduct, fraud, intentional tort, bad faith, or criminal
11 misconduct. No person other than a contractor shall have the
12 right to enforce any agreement for defense and indemnification
13 between a contractor and the department. The department shall
14 not enter into an agreement to provide legal defense and
15 indemnification to a contractor after January 1, 1990. For the
16 purposes of this subsection, "contractor" means a person
17 providing services to mitigate or clean up a discharge or release
18 or threatened discharge or release of a hazardous substance in
19 this State pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) or
20 the "Comprehensive Environmental Response, Compensation and
21 Liability Act of 1980," Pub.L. 96-510 (42 U.S.C. § 9601 et seq.).

22 Nothing in this section is intended to preclude removal and
23 cleanup operations by any person threatened by such discharges,
24 provided such persons coordinate and obtain approval for such
25 actions with ongoing State or federal operations. No action taken
26 by any person to contain or remove a discharge shall be construed
27 as an admission of liability for said discharge. No person who
28 renders assistance in containing or removing a discharge shall be
29 liable for any civil damages to third parties resulting solely from
30 acts or omissions of such person in rendering such assistance,
31 except for acts or omissions of gross negligence or willful
32 misconduct. In the course of cleanup operations, no person shall
33 discharge any detergent into the waters of this State without
34 prior authorization of the commissioner.

35 b. Notwithstanding any other provisions of P.L.1976, c.141
36 (C.58:10-23.11 et seq.), the department, subject to the approval
37 of the administrator with regard to the availability of funds
38 therefor, may remove or arrange for the removal of any
39 hazardous substance which:

40 (1) Has not been discharged from a grounded or disabled
41 vessel, if the department determines that such removal is
42 necessary to prevent an imminent discharge of such hazardous
43 substance; or

44 (2) Has not been discharged, if the department determines that
45 such substance is not satisfactorily stored or contained and said
46 substance possesses any one or more of the following
47 characteristics:

48 (a) Explosiveness;

49 (b) High flammability;

1 (c) Radioactivity;

2 (d) Chemical properties which in combination with any
3 discharged hazardous substance at the same storage facility
4 would create a substantial risk of imminent damage to public
5 health or safety or an imminent and severe damage to the
6 environment;

7 (e) Is stored in a container from which its discharge is
8 imminent as a result of contact with a hazardous substance which
9 has already been discharged and such additional discharge would
10 create a substantial risk of imminent damage to public health or
11 safety or imminent and severe damage to the environment; or

12 (f) High toxicity and is stored or being transported in a
13 container or motor vehicle, truck, rail car or other mechanized
14 conveyance from which its discharge is imminent as a result of
15 the significant deterioration or the precarious location of the
16 container, motor vehicle, truck, rail car or other mechanized
17 conveyance, and such discharge would create a substantial risk of
18 imminent damage to public health or safety or imminent and
19 severe damage to the environment; or

20 (3) Has been discharged prior to the effective date of
21 P.L.1976, c.141.

22 c. If and to the extent that he determines that funds are
23 available, the administrator shall approve and make payments for
24 any cleanup and removal costs incurred by the department for the
25 removal of a hazardous substance other than petroleum as
26 authorized by subsection b. of this section; provided that in
27 determining the availability of funds, the administrator shall not
28 include as available funds revenues realized or to be realized
29 from the tax on the transfer of petroleum, to the extent that
30 such revenues result from a tax levied at a rate in excess of \$0.01
31 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
32 (C.58:10-23.11h), unless the administrator determines that the
33 sum of claims paid by the fund on behalf of petroleum discharges
34 or removals plus pending reasonable claims against the fund on
35 behalf of petroleum discharges or removals is greater than 30%
36 of the sum of all claims paid by the fund plus all pending
37 reasonable claims against the fund.

38 d. The administrator may only approve and make payments for
39 any cleanup and removal costs incurred by the department for the
40 removal of a hazardous substance discharged prior to the
41 effective date of P.L.1976, c.141, pursuant to subsection b. of
42 this section, if, and to the extent that, he determines that
43 adequate funds from another source are not or will not be
44 available; and provided further, with regard to the cleanup and
45 removal costs incurred for discharges which occurred prior to the
46 effective date of P.L.1976, c.141, the administrator may not
47 during any one-year period pay more than \$18,000,000.00 in total
48 or more than \$3,000,000.00 for any discharge or related set or
49 series of discharges.

1 e. Notwithstanding any other provisions of P.L.1976, c.141, the
2 administrator, after considering, among any other relevant
3 factors, the department's priorities for spending funds pursuant
4 to P.L.1976, c.141, and within the limits of available funds, shall
5 make payments for the restoration or replacement of, or
6 connection to an alternative water supply for, any private
7 residential well destroyed, contaminated, or impaired as a result
8 of a discharge prior to the effective date of P.L.1976, c.141;
9 provided, however, total payments for said purpose shall not
10 exceed \$500,000.00 for the period between the effective date of
11 this subsection e. and January 1, 1983, and in any calendar year
12 thereafter.

13 f. Any expenditures made by the administrator pursuant to this
14 act shall constitute, in each instance, a debt of the discharger to
15 the fund. The debt shall constitute a lien on all property owned
16 by the discharger when a notice of lien, incorporating a
17 description of the property of the discharger subject to the
18 cleanup and removal and an identification of the amount of
19 cleanup, removal and related costs expended from the fund, is
20 duly filed with the clerk of the Superior Court. The clerk shall
21 promptly enter upon the civil judgment or order docket the name
22 and address of the discharger and the amount of the lien as set
23 forth in the notice of lien. Upon entry by the clerk, the lien, to
24 the amount committed by the administrator for cleanup and
25 removal, shall attach to the revenues and all real and personal
26 property of the discharger, whether or not the discharger is
27 insolvent.

28 The notice of lien filed pursuant to this subsection which
29 affects the property of a discharger subject to the cleanup and
30 removal of a discharge shall create a lien with priority over all
31 other claims or liens which are or have been filed against the
32 property, except if the property comprises six dwelling units or
33 less and is used exclusively for residential purposes, this notice of
34 lien shall not affect any valid lien, right or interest in the
35 property filed in accordance with established procedure prior to
36 the filing of this notice of lien. The notice of lien filed pursuant
37 to this subsection which affects any property of a discharger,
38 other than the property subject to the cleanup and removal, shall
39 have priority from the day of the filing of the notice of the lien
40 over all other claims and liens filed against the property, but
41 shall not affect any valid lien, right, or interest in the property
42 filed in accordance with established procedure prior to the filing
43 of a notice of lien pursuant to this subsection.

44 (cf: P.L.1987,c.415, s. 1)

45 2. This act shall take effect immediately.

46
47 *Sponsor* STATEMENT *to S 2657*
48

49 This bill creates a statutory right of contribution for settlers

1 under the "Spill Compensation and Control Act." Under this act,
2 a discharger of a hazardous substance or a person in any way
3 responsible for that discharge is strictly liable, jointly and
4 severally, for the cost of its cleanup. These means that a person
5 who is only partially responsible for the cost of a cleanup may be
6 required to pay the entire amount. In the normal course of tort
7 law, this person would have a right of contribution, the right to
8 collect money from others jointly responsible for the costs.
9 However, because of the ambiguity in the common law for
10 contribution for discharges of hazardous substances, and because
11 the "Spill Compensation and Control Act" fails to set forth that
12 right, many dischargers and other responsible parties have been
13 reluctant to enter into agreements with the Department of
14 Environmental Protection to cleanup a discharge of a hazardous
15 substance for fear that they would not be able to recover some of
16 their costs from the other liable parties. This has led to delays in
17 cleaning up many hazardous waste sites with the potential for
18 environmental harm.

19 This bill would rectify this problem by setting forth in the
20 "Spill Compensation and Control Act" a provision allowing those
21 parties who enter into an agreement with the department to
22 remove a hazardous discharge to seek contribution from those
23 responsible parties who have not entered into such an agreement.
24 The amount of contribution would be equal to the amount of
25 removal costs incurred by the contribution plaintiffs for which
26 the contribution defendants were liable.

27 As an additional incentive to enter into a settlement
28 agreement, and as a disincentive not to, the bill provides that a
29 party seeking contribution, in appropriate cases and with the
30 department's approval, may obtain treble damages from the
31 nonsettling parties. One third of the treble damages will be given
32 to the department for deposit in the "New Jersey Spill
33 Compensation Fund." The remainder will be divided among the
34 settling parties. Presently, treble damages may only be imposed
35 by the department upon a party who does not remove a hazardous
36 substance discharge pursuant to a departmental directive. The
37 bill protects against the unreasonable imposition of treble
38 damages for nonsettling parties by allowing treble damages only
39 with the department's approval and not allowing treble damages
40 where the nonsettling party for good cause failed or refused to
41 enter into a settlement agreement.

42 Additionally, the bill provides that in seeking contribution the
43 parties need only prove liability under the act and that the
44 parties upon whom contribution is sought could only assert those
45 defenses that they could otherwise assert against the department
46 in an original claim. Thus a nonsettling party would have no legal
47 advantage for not settling with the department.

SENATE ENVIRONMENTAL QUALITY COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2657 and ASSEMBLY, No. 3659

STATE OF NEW JERSEY

DATED: DECEMBER 10, 1990

The Senate Environmental Quality Committee favorably reports a Senate Committee Substitute for Senate Bill No. 2657 and Assembly Bill No. 3659.

This Senate Committee Substitute would provide a statutory right of contribution, where there is more than one other liable party, to a discharger of a hazardous substance who conducts a cleanup thereof, or to any person who conducts a cleanup and removal of such a discharge.

Under the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), a discharger of a hazardous substance or a person in any way responsible for the discharged substance is strictly liable, jointly and severally, for the cost of its cleanup and removal. Joint and several liability means that a person who is only partially responsible for the cost of a cleanup may be required to pay the entire amount. Federal statutory law and State common law both provide for this type of liability. In tort law, a defendant who is jointly and severally liable would have a right of contribution, which is the right to sue to collect money from other defendants who have also been found to be jointly responsible for the damages.

However, there is an uncertainty in pursuing contribution claims in hazardous substance cleanup cases. Recent court decisions have put into question the right of contribution under the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980" unless federal cleanup standards are followed or waived. Because a recent federal court decision questioned whether strict liability applies to all hazardous substance discharges, the right to contribution under New Jersey common law is uncertain. Finally, the Spill Act does not contain a provision that clearly provides for the right of contribution.

Although the right of contribution may exist under federal and State common and statutory law, the ambiguities in and between the laws, and as to standards of proof and allowable defenses result in the reluctance on the part of many dischargers and other responsible parties to enter into cleanup agreements with the Department of Environmental Protection (DEP) for fear that they may not be able to recover some costs from the other liable parties. This has led to delays in cleaning up many hazardous discharges.

This substitute sets forth in the Spill Act a provision that allows dischargers and others who clean up and remove a hazardous discharge to seek contribution from other dischargers and persons who conduct cleanups and removals. The committee substitute provides that the right of contribution be available to contribution plaintiffs who enter into a settlement with the DEP, and to those acting independent of a DEP order or directive to perform a cleanup and removal. The committee substitute directs the court to use equitable factors to allocate the contribution shares of the liable parties.

Because the high costs of litigation, such as counsel and expert witness fees, often act as disincentives for contribution actions, and thus negate the right, this committee substitute allows contribution plaintiffs who enter into settlement agreements with DEP to recover treble damages from the nonsettling parties to encourage early settlements. The DEP would determine when a contribution plaintiff could seek to recover treble damages, thereby ensuring that contribution plaintiffs not use this right to extract unfair settlements.

Treble damages would not be recoverable if the court finds that the nonsettling party refused to settle for good cause, or if the imposition of treble damages would be fundamentally unfair. The committee substitute also provides that the right to seek treble damages could only be used against a person named in a cleanup directive, and that the amount of damages would be calculated on the basis of the amount of contribution owed by the defendant, as determined by the court. The amount of contribution owed would approximate the degree of culpability of the parties. The contribution plaintiffs would receive two-thirds of the treble damages award and DEP would receive the remaining one-third for deposit into the New Jersey Spill Compensation Fund.

Additionally, the committee substitute provides that in seeking contribution the parties need only prove liability under the Spill Act, and that the parties against whom contribution is sought could only assert those defenses that they could otherwise assert against the department in an original claim (i.e., that the discharge was a result of an act or omission caused by war, sabotage, or God). Thus, a nonsettling party would have no legal advantage for not settling with the department. The provisions of this committee substitute would not affect the right to recover contributions under any other statutory or common law.

The committee substitute also makes several technical changes to the existing Spill Act. The addition of the word "cleanup" to "removal" is necessary to avoid confusion with federal law where "removal" has been interpreted to mean less than a complete "cleanup and removal" as defined under current State law. In an effort to eliminate the need to secure an admission of liability prior to instituting a cleanup or removal and thereby slowing the

remediation process is obviated by this committee substitute. Finally, wording changes intend to clarify that the committee substitute applies to any cleanup or removal, irrespective of the date of the discharge.

ASSEMBLY ENERGY AND ENVIRONMENT COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2657 and ASSEMBLY, No. 3659

STATE OF NEW JERSEY

DATED: JUNE 8, 1991

The Senate Committee Substitute for Senate Bill No. 2657/Assembly Bill No. 3659 is reported favorably by the Assembly Energy and Environment Committee.

The substitute bill provides a statutory right of contribution to a discharger of a hazardous substance or to any person who conducts a cleanup and removal of that discharge when there is more than one responsible party.

Under the "Spill Compensation and Control Act," P.L.1978, c.141 (C.58:10-23.11 et seq.), a discharger of a hazardous substance or a person in any way responsible for the discharged substance is strictly liable, jointly and severally, for the cost of its cleanup and removal. Joint and several liability means that a person who is only partially responsible for the cost of a cleanup may be required to pay the entire amount. Federal statutory law and State statutory and common law all provide for this type of liability. In tort law, a defendant who is jointly and severally liable may have a right of contribution, which is the right to sue to collect money from other defendants who have also been found to be jointly responsible for the damages.

However, there is an uncertainty in pursuing contribution claims in hazardous substance cleanup cases. Recent court decisions have put into question the right of contribution, under the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980" unless federal cleanup standards are followed or waived. Because a recent federal and State court decisions questioned whether strict liability applies to all hazardous substance discharges, the right to contribution under New Jersey common law is uncertain. Finally, the Spill Act does not contain a provision that clearly provides for the right of contribution.

Although the right of contribution may exist under federal and State common and statutory law, the ambiguities in and between the laws, and as to standards of proof and allowable defenses result in the reluctance on the part of many dischargers and other responsible parties to enter into cleanup agreements with the Department of Environmental Protection (DEP) for fear that they may not be able to recover some costs from the other liable parties. This has led to delays in cleaning up many hazardous discharges.

This substitute sets forth in the Spill Act a provision that allows dischargers and others who clean up and remove a hazardous substance discharge to seek contribution from other dischargers and liable persons. The committee substitute provides that the right of

contribution be available to contribution plaintiffs who enter into a settlement with the DEP, and to those acting independent of a DEP order or directive to perform a cleanup and removal. The committee substitute directs the court to use equitable factors to allocate the contribution shares of the liable parties.

Because the high costs of litigation, such as counsel and expert witness fees, often act as disincentives for contribution actions, and thus negate the right, this committee substitute allows contribution plaintiffs who enter into settlement agreements with DEP to recover treble damages from the nonsettling parties to encourage early settlements. The DEP would determine when a contribution plaintiff could seek to recover treble damages, thereby ensuring that contribution plaintiffs not use this right to extract unfair settlements.

Treble damages would not be recoverable if the court finds that the nonsettling party refused to settle for good cause, or if the imposition of treble damages would be fundamentally unfair. The committee substitute also provides that the right to seek treble damages could only be used against a person named in a cleanup directive, and that the amount of damages would be calculated on the basis of the amount of contribution owed by the defendant, as determined by the court. The amount of contribution owed should approximate the degree of culpability of the parties. The contribution plaintiffs would receive two-thirds of the treble damages award and DEP would receive the remaining one-third for deposit into the New Jersey Spill Compensation Fund.

Additionally, the committee substitute provides that in seeking contribution the parties need only prove liability under the Spill Act, and that the parties against whom contribution is sought could only assert those defenses that they could otherwise assert against the department in an original claim (i.e., that the discharge was a result of an act or omission caused by war, sabotage, or God). Thus, a nonsettling party would have no legal advantage for not settling with the department. The provisions of this committee substitute would not affect the right to recover contributions under any other statutory or common law.

The committee substitute also makes several technical changes to the existing Spill Act. The addition of the word "cleanup" to "removal" is necessary to avoid confusion with federal law where "removal" has been interpreted to mean less than a complete "cleanup and removal" as defined under current State law. The committee substitute allows any person who performs a cleanup and removal, as opposed to only a potentially responsible party, to seek contribution in order to eliminate the need to secure an admission of liability prior to instituting a cleanup or removal and thereby slowing the remediation process. Finally, although no specific retroactive clause was added, the committee substitute is worded so as to apply to any cleanup or removal, irrespective of the date of the discharge. A prospective application of the contribution right would be counter to the policy needs for that right.

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 2657 and ASSEMBLY, No. 3659

STATE OF NEW JERSEY

ADOPTED DECEMBER 10, 1990

Sponsored by Senator LESNIAK

1 AN ACT concerning liability for the removal of certain
2 discharged hazardous substances, and amending P.L.1976, c.141.
3

4 BE IT ENACTED by the Senate and General Assembly of the
5 State of New Jersey:

6 1. Section 7 of P.L.1976, c.141 (C.58:10-23.11f) is amended to
7 read as follows:

8 7. a. (1) Whenever any hazardous substance is discharged, the
9 department may, in its discretion, act to clean up and remove or
10 arrange for the cleanup and removal of such discharge or may
11 direct the discharger to clean up and remove, or arrange for the
12 cleanup and removal of, such discharge. If the discharge occurs
13 at any hazardous or solid waste disposal facility, the department
14 may order the facility closed for the duration of the cleanup and
15 removal operations. The department may monitor the
16 discharger's compliance with any such directive. Any discharger
17 who fails to comply with such a directive shall be liable to the
18 department in an amount equal to three times the cost of such
19 cleanup and removal, and shall be subject to the revocation or
20 suspension of any license or permit he holds authorizing him to
21 operate a hazardous or solid waste disposal facility.

22 (2) Whenever one or more dischargers or persons cleans up and
23 removes a discharge of a hazardous substance, those dischargers
24 and persons shall have a right of contribution against all other
25 dischargers and persons in any way responsible for a discharged
26 hazardous substance who are liable for the cost of the cleanup
27 and removal of that discharge of a hazardous substance. In an
28 action for contribution, the contribution plaintiffs need prove
29 only that a discharge occurred for which the contribution
30 defendant or defendants are liable pursuant to the provisions of
31 subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g),
32 and the contribution defendant shall have only the defenses to
33 liability available to parties pursuant to subsection d. of section 8
34 of P.L.1976, c.141 (C.58:10-23.11g). In resolving contribution
35 claims, a court may allocate the costs of cleanup and removal
36 among liable parties using such equitable factors as the court
37 determines are appropriate.

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the
above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 (3) The department may, in its sole discretion, when it will
2 expedite the cleanup and removal of any discharged hazardous
3 substance, and when the department determines that it is in the
4 public interest, authorize parties who have entered into an
5 agreement with the department to clean up and remove or
6 arrange for the cleanup and removal of a hazardous substance and
7 who seek contribution, to collect treble damages from any
8 contribution defendant who has failed or refused to comply with
9 any directive, was named on the directive, and who is subject to
10 contribution pursuant to this subsection. The treble damages
11 shall be based on the amount of contribution owed by a
12 contribution defendant, which share of contribution shall be
13 determined by the court. A contribution defendant from whom
14 treble damages is sought in a contribution action shall not be
15 assessed treble damages by any court where the contribution
16 defendant, for good cause shown, failed or refused to enter the
17 settlement agreement with the department or with the
18 contribution plaintiffs or where principles of fundamental fairness
19 will be violated. One third of an award of treble damages in a
20 contribution action pursuant to this paragraph shall be paid to the
21 department, which sum shall be deposited in the New Jersey Spill
22 Compensation Fund. The other two thirds of the treble damages
23 award shall be shared by the contribution plaintiffs in the
24 proportion of the responsibility for the cost of the cleanup and
25 removal that the contribution plaintiffs have agreed to with the
26 department or in an amount as has been agreed to by those
27 parties. Nothing in this subsection affects the rights of any party
28 to seek contribution pursuant to any other statute or under
29 common law.

30 [Removal] Cleanup and removal of hazardous substances and
31 actions to minimize damage from discharges shall, to the
32 greatest extent possible, be in accordance with the National
33 Contingency Plan for cleanup and removal of oil and hazardous
34 substances established pursuant to section 311(c)(2) of the federal
35 Water Pollution Control Act Amendments of 1972 (Pub.L.92-500,
36 33 U.S.C. § 1251 et seq.).

37 Whenever the department acts to clean up and remove a
38 discharge or contracts to secure prospective cleanup and removal
39 services, it is authorized to draw upon the money available in the
40 fund. Such money shall be used to pay promptly for all cleanup
41 and removal costs incurred by the department in cleaning up, in
42 removing or in minimizing damage caused by such discharge.

43 The department may agree to defend and indemnify a
44 contractor against claims, causes of action, demands, costs, or
45 judgments made against a contractor arising as a direct result of
46 the contractor's provision of hazardous substance cleanup or
47 removal, or mitigation services pursuant to a contract with the
48 department.

1 This legal defense and indemnification shall not apply to claims,
2 causes of action, demands, costs, or judgments which are proven
3 to have arisen from gross negligence, willful misconduct, fraud,
4 intentional tort, bad faith, or criminal misconduct, or to claims
5 for punitive or exemplary damage. The department shall agree to
6 provide legal defense and indemnification to a contractor only if
7 it determines that adequate environmental liability insurance is
8 not available or not available at a reasonable cost to the
9 contractor. The department shall agree to provide legal defense
10 and indemnification to a contractor pursuant to terms and
11 limitations which it deems appropriate. Any agreement by the
12 department to defend or indemnify a contractor shall not bar the
13 department from the exercise of any available legal remedies for
14 the enforcement of the contract between the department and the
15 contractor, the recovery of damages to which the department
16 may be entitled resulting from a contractor's failure to perform
17 the contract, or for the recovery of funds expended for the
18 defense of a contractor if the defense was undertaken in response
19 to a claim or cause of action brought against the contractor
20 which is proven to have arisen from gross negligence, willful
21 misconduct, fraud, intentional tort, bad faith, or criminal
22 misconduct. No person other than a contractor shall have the
23 right to enforce any agreement for defense and indemnification
24 between a contractor and the department. The department shall
25 not enter into an agreement to provide legal defense and
26 indemnification to a contractor after January 1, 1990. For the
27 purposes of this subsection, "contractor" means a person
28 providing services to mitigate or clean up and remove a discharge
29 or release or threatened discharge or release of a hazardous
30 substance in this State pursuant to P.L.1976, c.141 (C.58:10-23.11
31 et seq.) or the "Comprehensive Environmental Response,
32 Compensation and Liability Act of 1980," Pub.L.96-510 (42
33 U.S.C. § 9601 et seq.).

34 Nothing in this section is intended to preclude removal and
35 cleanup operations by any person threatened by such discharges,
36 provided such persons coordinate and obtain approval for such
37 actions with ongoing State or federal operations. No action taken
38 by any person to contain or clean up and remove a discharge shall
39 be construed as an admission of liability for said discharge. No
40 person who renders assistance in containing or cleaning up and
41 removing a discharge shall be liable for any civil damages to third
42 parties resulting solely from acts or omissions of such person in
43 rendering such assistance, except for acts or omissions of gross
44 negligence or willful misconduct. In the course of cleanup or
45 removal operations, no person shall discharge any detergent into
46 the waters of this State without prior authorization of the
47 commissioner.

48 b. Notwithstanding any other provisions of P.L.1976, c.141

1 (C.58:10-23.11 et seq.), the department, subject to the approval
2 of the administrator with regard to the availability of funds
3 therefor, may clean up and remove or arrange for the cleanup and
4 removal of any hazardous substance which:

5 (1) Has not been discharged from a grounded or disabled
6 vessel, if the department determines that such cleanup and
7 removal is necessary to prevent an imminent discharge of such
8 hazardous substance; or

9 (2) Has not been discharged, if the department determines that
10 such substance is not satisfactorily stored or contained and said
11 substance possesses any one or more of the following
12 characteristics:

13 (a) Explosiveness;

14 (b) High flammability;

15 (c) Radioactivity;

16 (d) Chemical properties which in combination with any
17 discharged hazardous substance at the same storage facility
18 would create a substantial risk of imminent damage to public
19 health or safety or an imminent and severe damage to the
20 environment;

21 (e) Is stored in a container from which its discharge is
22 imminent as a result of contact with a hazardous substance which
23 has already been discharged and such additional discharge would
24 create a substantial risk of imminent damage to public health or
25 safety or imminent and severe damage to the environment; or

26 (f) High toxicity and is stored or being transported in a
27 container or motor vehicle, truck, rail car or other mechanized
28 conveyance from which its discharge is imminent as a result of
29 the significant deterioration or the precarious location of the
30 container, motor vehicle, truck, rail car or other mechanized
31 conveyance, and such discharge would create a substantial risk of
32 imminent damage to public health or safety or imminent and
33 severe damage to the environment; or

34 (3) Has been discharged prior to the effective date of
35 P.L.1976, c.141.

36 c. If and to the extent that he determines that funds are
37 available, the administrator shall approve and make payments for
38 any cleanup and removal costs incurred by the department for the
39 cleanup and removal of a hazardous substance other than
40 petroleum as authorized by subsection b. of this section; provided
41 that in determining the availability of funds, the administrator
42 shall not include as available funds revenues realized or to be
43 realized from the tax on the transfer of petroleum, to the extent
44 that such revenues result from a tax levied at a rate in excess of
45 \$0.01 per barrel, pursuant to subsection 9b. of P.L.1976, c.141
46 (C.58:10-23.11h), unless the administrator determines that the
47 sum of claims paid by the fund on behalf of petroleum discharges
48 or cleanup and removals plus pending reasonable claims

1 against the fund on behalf of petroleum discharges or cleanup and
2 removals is greater than 30% of the sum of all claims paid by the
3 fund plus all pending reasonable claims against the fund.

4 d. The administrator may only approve and make payments for
5 any cleanup and removal costs incurred by the department for the
6 cleanup and removal of a hazardous substance discharged prior to
7 the effective date of P.L.1976, c.141, pursuant to subsection b. of
8 this section, if, and to the extent that, he determines that
9 adequate funds from another source are not or will not be
10 available; and provided further, with regard to the cleanup and
11 removal costs incurred for discharges which occurred prior to the
12 effective date of P.L.1976, c.141, the administrator may not
13 during any one-year period pay more than \$18,000,000[.00] in
14 total or more than \$3,000,000[.00] for any discharge or related
15 set or series of discharges.

16 e. Notwithstanding any other provisions of P.L.1976, c.141, the
17 administrator, after considering, among any other relevant
18 factors, the department's priorities for spending funds pursuant
19 to P.L.1976, c.141, and within the limits of available funds, shall
20 make payments for the restoration or replacement of, or
21 connection to an alternative water supply for, any private
22 residential well destroyed, contaminated, or impaired as a result
23 of a discharge prior to the effective date of P.L.1976, c.141;
24 provided, however, total payments for said purpose shall not
25 exceed \$500,000[.00] for the period between the effective date of
26 this subsection e. and January 1, 1983, and in any calendar year
27 thereafter.

28 f. Any expenditures made by the administrator pursuant to this
29 act shall constitute, in each instance, a debt of the discharger to
30 the fund. The debt shall constitute a lien on all property owned
31 by the discharger when a notice of lien, incorporating a
32 description of the property of the discharger subject to the
33 cleanup and removal and an identification of the amount of
34 cleanup, removal and related costs expended from the fund, is
35 duly filed with the clerk of the Superior Court. The clerk shall
36 promptly enter upon the civil judgment or order docket the name
37 and address of the discharger and the amount of the lien as set
38 forth in the notice of lien. Upon entry by the clerk, the lien, to
39 the amount committed by the administrator for cleanup and
40 removal, shall attach to the revenues and all real and personal
41 property of the discharger, whether or not the discharger is
42 insolvent.

43 The notice of lien filed pursuant to this subsection which
44 affects the property of a discharger subject to the cleanup and
45 removal of a discharge shall create a lien with priority over all
46 other claims or liens which are or have been filed against the
47 property, except if the property comprises six dwelling units or
48 less and is used exclusively for residential purposes, this notice of

1 lien shall not affect any valid lien, right or interest in the
2 property filed in accordance with established procedure prior to
3 the filing of this notice of lien. The notice of lien filed pursuant
4 to this subsection which affects any property of a discharger,
5 other than the property subject to the cleanup and removal, shall
6 have priority from the day of the filing of the notice of the lien
7 over all other claims and liens filed against the property, but
8 shall not affect any valid lien, right, or interest in the property
9 filed in accordance with established procedure prior to the filing
10 of a notice of lien pursuant to this subsection.

11 (cf: P.L.1987, c.415, s.1)

12 2. This act shall take effect immediately.

13

14

15 ENVIRONMENT

16

17 Provides a statutory right of contribution for dischargers and
18 responsible parties pursuant to the "Spill Compensation and
19 Control Act."

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**REPORT
OF THE
SUPREME COURT COMMITTEE
ON
ENVIRONMENTAL LITIGATION**

MARCH 23, 1990

the Matter of the Trenton Complex Highway Project
(Waterfront Development Permit #84-0021-1 and Wetlands Type
"B" Permit #84-00-2§), Docket No. A-5365-85T8 (App. Div.,
October 16, 1987) certif. denied 110 N.J. 193 (1988); Evan
Spalt, et al. v. New Jersey Department of Environmental
Protection, Docket No. A-3480-87T8 (App. Div., December 5,
1989).

Environmental groups and other "third parties" believe that they can provide important insights. While they acknowledge that some vexatious lawsuits might be brought by persons who oppose a siting merely because it is in their "backyard," they suggest that these unfounded cases could be rapidly disposed by the Office of Administrative Law.

20. Encouraging Voluntary Compliance.

Particularly in large scale, complex, multi-party cases, creating an express statutory right of contribution among potentially responsible parties might encourage voluntary compliance. Some Committee members believe that the right to contribution is already clearly provided. Others suggest that this is an area in which the substantive law of this State is not very well defined. Most Committee members believe that a number of the common law theories upon which contribution claims can be brought probably work. However, some suggest that because of limitations in analogous law (for example, the Contribution Among Joint Tortfeasors Act)

and the slow pace of common law development in general, it is uncertain just how a contribution action will fare in the state court system. They suggest that a number of environmental cases are probably being contested simply because a clearly defined right of contribution is lacking in this State. As a result, the limited judicial resources that are allocable to these cases are often misspent on needless litigation.

An example will illustrate the question. In one of the more typical scenarios, the DEP will receive information that some hazardous substance has been discharged on a particular site. Tests are performed and informal testimonial evidence is taken, so that the DEP acquires a list of individuals and entities that may be responsible for this discharge. The DEP then issues a directive under the Spill Act.

Recipients of directives are often companies that have the capital and the desire to comply with whatever the DEP may administratively want them to do, but some say that they are impeded by the inadequacies and uncertainties in the law of contribution. But because of joint and several liability provisions under the Spill Act, which provide that anyone who may have liability might be held responsible for the entire clean-up, an individual or an entity responsible for two or three drums of hazardous substance may be held responsible for a \$20,000,000 clean-up, assuming that no other "deep pocket" is available to pursue.

The DEP rightly pursues those who are in a position to pay, following the precept that "the polluter must pay." The problem, however, is said by some to lie in inducing so-called recalcitrant parties. Recipients of DEP directives need to be induced to take responsibility.

A more clearly expressed right of contribution might be one way to do this. Those recipients of directives who would be willing to comply by incurring costs that seem disproportionately higher than their share of the responsibility would be certain about their right to contribution against other parties under the Spill Act, since the Act provides for strict (and, therefore, clear) liability. Ultimately, this might have the salutary effect of inducing parties who would otherwise be recalcitrant to think twice and, in essence, to pay up under circumstances where they should.

This Committee also notes the possibility of providing a further incentive of treble damages for parties undertaking more than their "fair share" of an environmental clean-up. At present, only the DEP can obtain treble damages, subject to statutory and case law limitations.

While treble damages might be a powerful incentive for voluntary compliance and a powerful disincentive for recalcitrance, there might be policy considerations against

providing such a windfall. In any event, any such proposal should be carefully scrutinized, especially if it is determined that a clearer statutory right of contribution would not substantially increase the rate of voluntary compliance.

21. Coordination with Federal Bankruptcy Proceedings.

Besides the need for better inter-agency coordination at the state level, there is also a need to improve coordination between State environmental agencies and federal bankruptcy representatives. In particular, it is important for federal bankruptcy trustees to be aware of the state's important environmental concerns. An increasingly common scenario is played out when a firm declares bankruptcy in the face of environmental penalties or costs. The operation of the business then passes to a bankruptcy trustee who may have little awareness of the firm's environmental responsibilities. Preoccupied with the task of preserving the assets of creditors, or with plans for corporate reorganization, the trustee seldom finds time to master an awareness of the pertinent environmental issues. As a result, actions are sometimes taken that impede, for example, the closing of a dangerous facility. Therefore, along with providing specially trained state judges, better trained prosecutors and better coordination among state agencies, this committee also finds a compelling need for improved coordination between state environmental agencies and federal bankruptcy

placed the burden upon plaintiff to show irreparable harm, an underlying right and the preponderance of the equities (id. at 129), the court imposed a burden on the municipality to show that it had a substantial interest to protect, that the ordinance was related to that interest and that it allowed a sufficient alternative means of communication where the ordinance directly affected First Amendment rights. Id. at 130. In short, the municipality had to establish the constitutionality of the ordinance in order to escape the granting of injunctive relief.

Note, that the Chief Justice did not suggest that the normal proof burden would change where the movant was a governmental entity before the special panel. Indeed, in describing the constituent elements of an emergent motion to the panel, the Chief's directive requires that it be supported by an affidavit by a professional staff member or an environmental expert specifying "with particularity" the nature of the problem, those responsible for it, the relief sought, and anything else relevant to establish that the environment needs protection from substantial damage. Directive 8-89, p. 1-2.

Burden of Proof for Obtaining Injunctive Relief

Recommendation B.3. The general judicial rules for granting or denying injunctive relief are sound. However, the Supreme Court should adopt a court rule requiring the courts to give substantial weight to proof of a violation of a statute designed to protect the environment in deciding whether to grant an application for injunctive relief.

New Jersey's court rules governing civil practice are specifically designed to facilitate a litigant's immediate access to the courts. Pursuant to R. 4:52-1, a plaintiff may file a complaint for injunctive relief and, at the same time, apply for an order requiring a defendant to show cause why either permanent injunctive relief should not be entered as requested in plaintiff's complaint or a preliminary injunction granted pending disposition on the complaint. Additionally, R. 4:52-1 sanctions applications for temporary restraints by order to show cause in situations where a realistic prospect exists that irreparable injury will occur before the preliminary injunction hearing can be held. The rule also deals with the possibility that exceptional circumstances may arise justifying entry of an order granting temporary restraints on an ex parte application where "it appears from specific facts shown by affidavit or verified complaint that immediate and irreparable damage will probably result to the plaintiff before notice can be served or informally given and a hearing had thereon."

The court rules also reference R. 4:52-1 in the provisions pertaining to the filing of summary actions, generally decided on the record (i.e., complaint and affidavits) without discovery. R. 4:67-2 provides an alternative vehicle to obtaining swift judicial disposition by sanctioning the filing of a summary action by order to show cause at any time subsequent or simultaneous to the filing of a verified complaint. Additionally, a summary action may be instituted through the

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filing of a complaint for the collection or enforcement of statutorily authorized penalties. R. 4:70-1 et seq.

The blueprint generally followed in applications for injunctive relief is the filing of a notice of motion or order to show cause specifying the relief requested and the time and place for hearing of the motion, supporting affidavits articulating the need for the specific relief being sought and, typically, a memorandum of law delineating the legal grounds for the application. Upon the filing of a movant's papers, the court normally sets a return date on the order to show cause, ensures that the defendant has been served with plaintiff's papers, if they have not already been provided, and establishes a timetable for the defendant to file responsive papers, including affidavits. Thereafter, the trial court renders its decision on plaintiff's application either on the record or after consideration of additional testimony. In so doing, it is not bound by any specific time limitations.

A court's decision on an application for temporary or preliminary injunctive relief is governed by the well-established standard that evolved from a long line of cases dating from Citizens Coach Co. v. Camden Horse Railroad Co., 29 N.J. Eq 299, 303-306 (E. & A. 1878), to the Supreme Court's succinct formulation in Crowe v. DeGioia, 90 N.J. 126 (1982). The Crowe court articulated the burden that must be sustained when seeking injunctive relief, noting that a movant must establish that: 1) relief is necessary to prevent irreparable harm; 2) the underlying right sought to be enforced is settled;